100703-5

COA No. 81352-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN KELLY,

Petitioner.

# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Kelly asks this Court to accept review of an opinion affirming his conviction for failing to register. The Court of Appeals issued its first opinion in his case on November 8, 2021. Mr. Kelly filed a motion for reconsideration. The Court of Appeals issued an order denying the motion for reconsideration,[1] but it also issued a substitute opinion[2] on January 31, 2022.

## B. ISSUES PRESENTED FOR REVIEW

Under the law of the case doctrine, the State bears the heavy burden of proving additional elements if the State agrees to place the elements in the to-convict instruction. The law of the case doctrine also applies to all unchallenged jury instructions, and so this Court determines whether sufficient

[1] Appendix A.
[2] Appendix B.

evidence exists to affirm a conviction by examining all of the instructions.

The State agreed to jury instructions requiring it to assume the burden of proving Mr. Kelly either lacked a fixed address and failed to register weekly, or Mr. Kelly failed to register three days after being released from a sex offense. However, the State failed to present evidence demonstrating Mr. Kelly's residence did not meet the jury instruction's definition of a "fixed residence." The State also agreed to a jury instruction forbidding the jury from using evidence of Mr. Kelly's prior sex offenses to determine whether he was in custody for a sex offense.

(a) Insufficient evidence supports Mr. Kelly's conviction. RAP 13.4(b)(1)-(4).

(b) Alternatively, defendants have the right to a unanimous jury verdict. If the court instructs the jury that a crime can be committed by various alternative means, either (1) the State must present sufficient evidence to prove each

alternative mean beyond a reasonable doubt; or (2) the court must instruct the jury it must be unanimous as to a single alternative mean when it reaches its verdict.

The court instructed the jury it could find Mr. Kelly committed the crime of failure to register via two alternative means. Under the law of the case doctrine, the State was required to either prove both means or have the court issue a unanimity instruction. However, the court did not issue a unanimity instruction, and the State failed to present sufficient evidence as to both of the alternative means. RAP 13.4(b)(1)-(4).

(c) The Court of Appeals held the doctrine of invited error precluded Mr. Kelly from raising the alternative means argument on appeal because he requested the to-convict instruction. This is contrary to this Court's opinion in *Hickman*,[3] where this Court rejected the application of the

[3] 135 Wn.2d 97, 954 P.2d 900 (1998).

invited error doctrine to challenges based on the law of the case doctrine. RAP 13.4(b)(1), (3).

## C. STATEMENT OF THE CASE

Michael Kelly must register as a sex offender due to a conviction he obtained when he was fourteen years old. CP 4; 2RP 188. On August 9, 2018, Mr. Kelly filled out a form with the King County Sheriff's Office registering as a sex offender who lacked a fixed address. 2RP 24, 68, 70-71. Mr. Kelly checked in with the King County Sherriff's Office weekly until the week of September 18, 2018. 2RP 24, 178-79.

The State jailed Mr. Kelly between October 2, 2018 and October 29, 2018, due to a community custody violation. 2RP 131-33. Mr. Kelly stated that on October 30, 2018, he again registered with the King County Sheriff's Office; this time he filled out the form that stated he had a fixed address. 2RP 188-90, 236. However, the King County Sheriff's Office claimed to have no record Mr. Kelly registered on that date. 2RP 24-25.

The State charged Mr. Kelly with one count of failure to register between November 5, 2018 and December 19, 2018. CP 95. Between August 9, 2018 and the time of trial, except for his incarceration, Mr. Kelly resided at the Union Gospel Mission, a shelter that provides multiple amenities for its residents. 2RP 158, 161, 165-67, 183.

The information alleged Mr. Kelly failed to register as a sex offender under two particular subsections of the failure to register statute: (1) failure to report weekly when lacking a fixed address; and (2) failure to report within three days after the government released him from custody in jail for a sex offense. CP 95. The jury instructions also commanded the jury to find Mr. Kelly guilty of either (1) failing to register weekly when lacking a fixed address; or (2) failing to register within three days of being released from jail for a sex offense. CP 107-08. Mr. Kelly stipulated to the prior conviction that required him to register and to his two prior convictions for failing to

register. *See* CP 96, 105, 121-23. The jury found Mr. Kelly guilty, and he now appeals.

## D. ARGUMENT

**This Court should accept review because, under the law of the case doctrine, the State presented insufficient evidence to support Mr. Kelly's conviction. Moreover, in contravention of this Court's precedent, the Court of Appeals erroneously applied the invited error doctrine to preclude Mr. Kelly from raising his alternative means challenge.**

a. Under the law of the case doctrine, the State must prove all elements it agrees to include in the to-convict instruction, even if the statute does not require the State to prove the additional elements.

The State bears the heavy burden of proving each element of a crime beyond a reasonable doubt. U.S. CONST. amend. XIV; Const. art. I, § 3; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Under the law of the case doctrine, the State bears the same heavy burden to prove additional elements not required by statute if the State agrees to place the additional elements in the to-convict

instruction. *State v. Hickman*, 188 Wn.2d 97, 102, 954 P.2d 900 (1998). The doctrine also applies to *all* unchallenged instructions, and so this Court must determine whether the State presented sufficient evidence to sustain the verdict "by the application of the instructions and rules of law laid down in the charge." *State v. France*, 180 Wn.2d 809, 815-16, 329 P.3d 864 (2014) (quoting *Tonkovich v. Dep't of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948)). Thus, this Court assesses the sufficiency of the evidence by examining *all* of the instructions the State did not object to. *State v. Johnson*, 188 Wn.2d 742, 755, 399 P.3d 507 (2017).

This Court determined the crime of failure to register is not an alternative means crime, and this Court also concluded residential status is not an element of the crime. *See State v. Peterson*, 168 Wn.2d 763, 771, 774, 230 P.3d 588 (2010). However, the State, without objection, agreed to include the following language in the to-convict instruction:

> (a) That between November 5, 2018 and December 19, 2018: (i) **the defendant lacked a fixed address**; and (ii) the defendant failed to report weekly, in person to the sheriff of the county where the defendant was registered; or
>
> (b) That between November 5, 2018 and December 19, 2018, the defendant, **having been in custody for a sex offense**, failed to register with the county sheriff for his county of residence within three business days of release from a local jail.

CP 107; RP 203 (emphases added).

Thus, under the law of the case doctrine, the State agreed to prove, beyond a reasonable doubt, that Mr. Kelly lacked a fixed address or that he failed to register after being in custody for a sex offense. *See generally State v. Batson*, 194 Wn. App. 326, 377 P.3d 238 (2016) (reversing conviction for failure to register due to insufficient evidence where jury instructions required the State to prove the defendant lacked a fixed address); *see also* Brief of Appellant at 45-55, *State v. Batson*, 194 Wn. App. 326 (No. 72158-5-I), 2015 WL 4251230.

And because the State did not object to the jury instructions defining the terms "fixed residence" and "lack[ing]

a fixed residence," the State agreed to undertake the burden of proving Mr. Kelly "lacked a fixed residence" based on the definitions in this instruction. CP 114; RP 204; *Batson*, 194 Wn. App. at 332. Indeed, "the jury is presumed to read the court's instructions as a whole, and all instructions should be read in light of all other instructions." *State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997).

b. The State took up the burden of proving Mr. Kelly lacked a fixed address, but it failed to prove this beyond a reasonable doubt.

One of the means the State alleged in the to-convict instruction was that Mr. Kelly failed to register weekly, which is required when one lacks a fixed residence. CP 107. The court's instructions to the jury expressly state a shelter program qualifies as a fixed residence if: (1) it is a shelter program designed to provide temporary living accommodations for the homeless; (2) it provides an individual with a personally assigned living space; and (3) the individual is permitted to store belongings in the living space. CP 114; *see also* RCW

9A.44.128(5), (9). Additionally, the jury instructions define a "fixed residence" as a "building that a person lawfully and habitually uses as living quarters a majority of the week. 'Use as a living quarters' means to conduct activities consistent with the common understanding of residing, such as sleeping; eating; keeping personal belongings; receiving mail; and paying utilities, rent, or mortgage." CP 114.

As the jury instructions required, the evidence actually affirmatively demonstrated the Union Gospel Mission qualified as a "fixed residence." The State failed to present evidence proving otherwise. The Court of Appeals' opinion appears to implicitly accept this argument, as it does not opine that the State presented sufficient evidence to prove Mr. Kelly lacked a fixed residence.

During its case in chief, the State presented scant evidence about the living conditions at Union Gospel Mission. The extent of the evidence was: one of the State's witnesses admitted the King County Sheriff's office classifies some

homeless shelters as a "fixed residence." 2RP 63-67. This same witness said she never visited Union Gospel Mission to see if it fit the criteria of a "fixed residence." 2RP 66-67. None of the State's witnesses delivered any other testimony concerning the living conditions at Union Gospel Mission.

However, during Mr. Kelly's case-in-chief, he gave detailed testimony about the living conditions at the Union Gospel Mission. Mr. Kelly began staying at the Union Gospel Mission on August 9, 2018. 2RP 158. He stayed at Union Gospel Mission every night he was in the community during the charging period. 2RP 159, 176.

Mr. Kelly secured a bed at Union Gospel Mission every night. 2RP 162-64. Individuals who reside at the Union Gospel Mission can eat meals there, and they can receive mail. 2RP 161, 166. The Union Gospel Mission allows people to store their personal belongings with them on their cot when they are on their cot. 2RP 165, 183. When an individual is not in his cot, he can store his belongings in a locker. 2RP 183.

This evidence readily demonstrated Union Gospel Mission is a "shelter program" that qualifies as a fixed residence per the court's instructions to the jury. The testimony established Union Gospel Mission provides living accommodations for the homeless. CP 114. Union Gospel Mission permits people to "conduct activities consistent with the common understanding of residing, such as sleeping; eating, keeping personal belonging; [and] receiving mail," which the jury instructions define as consistent with residing in a fixed residence. CP 107, 114.

Additionally, Union Gospel Mission consistently provided Mr. Kelly with "a personally assigned living space," i.e., a bed to sleep in every night. CP 114. While the particular bed Mr. Kelly slept on fluctuated depending on the day or week, that is irrelevant. The jury instructions do not instruct the jury to find Mr. Kelly had a "personally assigned living space" that never alternated during the charging period. CP 114. The instructions simply required the jury to find Union Gospel

mission provided him with a "personally assigned living space." CP 114. Thus, what is actually relevant is that Union Gospel Mission consistently assigned him with *a* personal living space during the charging period.

Finally, the Union Gospel Mission permitted Mr. Kelly to store his belongings in his cot when he was present. CP 114. When he was not present at Union Gospel Mission, Union Gospel Mission permitted him to store his belongings in a locker within the shelter.

The State presented insufficient evidence for the jury to find Mr. Kelly lacked a fixed residence during the charging period.

c. The State also assumed the burden of proving Mr. Kelly was in custody for a sex offense, but it failed to object to a jury instruction that forbade the jury from finding he was in custody for a sex offense.

The other means alleged in the to-convict instruction was that Mr. Kelly failed to register within three business days after being released from custody for a sex offense. CP 107; *see*

RCW 9A.44.130(4)(a)(i). A person is "in custody" for a "sex offense" if the person is in custody due to violating a term of community custody for the underlying sex offense that triggered the requirement to register as a sex offender. *State v. Watson*, 160 Wn.2d 1, 11, 154 P.3d 909 (2007).

Here, however, the State failed to object to a jury instruction that forbade the jury from using evidence of Mr. Kelly's prior sex offenses to conclude Mr. Kelly was in custody during the charging period for a "sex offense." Jury Instruction 5 reads,

> Certain evidence has been admitted in this case for only a limited purpose. **Evidence, including the stipulation, of the defendant's prior sex offense conviction is to be considered by you only for the purpose of determining the elements of the crime and that the defendant has a duty to register as a sex offender. You are not to speculate as [to] the nature of this prior conviction. You may not consider it for any other purpose.** Any discussion of this evidence during your deliberations must be consistent with this limitation.
>
> **Evidence, including the stipulation, of the defendant's prior two felony failure to register as a sex offender convictions are to be considered by you only for the purpose of answering the question listed in the special**

> **verdict form, and for the purpose of assessing whether the state has proved that the defendant acted with knowledge. You may not consider this evidence for any other purpose.** Any discussion of this evidence during your deliberations must be consistent with this limitation.

CP 105 (emphases added).

Accordingly, both portions of this jury instruction limit how the jury can use the evidence concerning Mr. Kelly's prior sex offenses. The second portion of the instruction narrowed the provisions of the first portion and commanded the jury to only use Mr. Kelly's prior convictions for failure to register to answer whether (1) Mr. Kelly knowingly failed to register; and (2) Mr. Kelly was previously twice convicted of failing to register. CP 105, CP 120.

Significantly, the instructions forbid the jury from using the evidence of Mr. Kelly's sex convictions for any other purpose, including to assess whether Mr. Kelly was in custody for a sex offense, as the to-convict instruction requires. CP 105, 107. But without the evidence of Mr. Kelly's initial sex offense

that required him to register, and without the evidence demonstrating Mr. Kelly committed an additional two sex offenses when he failed to register, no evidence existed to support the State's contention that Mr. Kelly was in custody for a sex offense.

Nevertheless, the Court of Appeals held sufficient evidence existed to uphold this mean, but it overlooked key facts and the jury instruction discussed above. The Court of Appeals held sufficient evidence existed because Mr. Kelly testified that he was in custody for 2015 probation violation, which was labeled a sex offense. Op. at 8. Mr. Kelly stipulated to the 2015 cause number, which the State charged in 2015, but Mr. Kelly pleaded guilty to in 2016. 1/21/20RP 38-39; Ex. 15. The cause number for the conviction appears to reflect the 2015 charging date and is numbered 15-1-00469-1. Ex. 15. The booking sheet from the relevant time of incarceration for this charge states Mr. Kelly was in custody for the 15-1-004691 cause number. Ex. 18, pg. 2. Consequently, Mr. Kelly's

testimony that he was incarcerated for a sex offense related to the 2015 cause number constituted additional evidence of his 2016 conviction for failing to register.

However, the jury instructions severely limited how the jury could use the evidence. CP 105. Consequently, the jury—and the Court of Appeals—could not consider Mr. Kelly's testimony relating to his incarceration for the 2016 conviction to determine whether Mr. Kelly was in custody for a sex offense. The Court could only use this evidence to assess whether sufficient evidence existed to uphold the special verdict and to determine whether Mr. Kelly acted with knowledge. CP 105. However, the Court of Appeals used this evidence for another purpose, which is contrary to the instruction. Op. at 8-9.

The State presented insufficient evidence to prove Mr. Kelly was in custody for a sex offense. RAP 13.4(b)(1)-(4).

d. The Court of Appeals erroneously applied the invited error doctrine to a law of the case challenge.

Mr. Kelly argued that alternatively, if the Court found sufficient evidence supported one of the alternative means but not the other, the Court should reverse and remand for a new trial. *See State v. Tyler*, 191 Wn.2d 205, 422 P.3d 436 (2018) (leaving open that under the law of the case doctrine, jury instructions can create alternative means to commit a single offense even if the crime is not, by statute, an alternative means crime).

The Washington Constitution guarantees defendants the right to a unanimous jury verdict. Const. art. I, § 21; *State v. Woodlyn*, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017). The right to a unanimous jury verdict correlates with a defendant's right to due process. U.S. CONST. amend. XIV; Const. art. I, § 3.The State jeopardizes this right when it accuses the defendant of committing multiple alternative means for committing a single crime, instructs the jury as to the alternative means, but

the court and the State neglect to instruct the jury that it must be unanimous as to a single alternative mean of committing the crime. *Woodlyn*, 188 Wn.2d at 163-64.

Accordingly, to ensure jury unanimity, the court must instruct the jury it must set forth a particularized expression demonstrating it unanimously agreed the defendant violated a single alternative mean. *Id*. at 164. If the court failed to do this, this Court can only uphold a conviction if each alternative mean is supported by sufficient evidence. *Woodlyn*, 188 Wn.2d at 165.

However, the Court of Appeals held the invited error doctrine precluded Mr. Kelly from raising an alternative means doctrine on appeal, which is contrary to this Court's opinion in *Hickman*. Op. at 6-7. In *Hickman*, the State charged Mr. Hickman with insurance fraud after he submitted a fraudulent insurance claim telephonically to his insurance company in King County while living in Hawaii. 135 Wn.2d at 100-01. The Snohomish County prosecutor tried Mr. Hickman's case, and

Mr. Hickman submitted a jury instruction that required the State to prove he committed the crime in Snohomish County. *Id*. at 106 (Talmadge, J., Dissenting). However, under the applicable statute, the State did not bear the burden of proving the crime occurred in a particular county. *Id.* at 104. On appeal, Mr. Hickman argued that under the law of the case doctrine, the State assumed the burden of proving the crime occurred in Snohomish County but failed to do so. *Id*. at 101.

This Court agreed and reversed. *Id*. at 105. At no point did this Court apply the invited error doctrine to preclude Mr. Hickman from obtaining relief on appeal despite the fact that he proposed the instruction at issue. This troubled the dissent, which would have held Mr. Hickman "waived his right to raise issues regarding venue," because "[Mr.] Hickman himself presented the 'to convict' jury instruction […] to the trial court and he did not raise the issue of sufficiency of the evidence of venue until he appealed his insurance fraud conviction to the Court of Appeals." *Id*. at 106 (Talmadge, J., Dissenting).

By rejecting the dissent's position, this Court rejected the application of the invited error doctrine to challenges based on the law of the case doctrine. Here, however, the Court of Appeals erroneously applied the doctrine of invited error.

The Court of Appeals relied on defense-submitted self-defense instructions where this Court has held the invited error doctrine applied, but these cases are not on point. Op. at. 6-7. First, this Court plainly rejected the application of the invited error doctrine to challenges based on the law of the case doctrine in *Hickman.* Second, the jury instruction at issue here did not erroneously state the law. This distinguishes this case from *Studd*, which held the invited error doctrine precluded relief where the defendant submitted a jury instruction that **erroneously** stated the law on self-defense. 137 Wn.2d 533, 538, 973 P.2d 1049 (1999).

This Court should accept review. RAP 13.4(b)(1)-(4).

## E. CONCLUSION

For the reasons stated in this petition, Mr. Kelly respectfully requests this Court accept review.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document as 3,555 words.

DATED this 2nd day of March, 2022.

Respectfully submitted,

/s Sara S. Taboada
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Washington Appellate Project
Attorney for Appellant

# Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

| | |
|---|---|
| STATE OF WASHINGTON<br><br>Respondent,<br><br>v.<br><br>MICHAEL JOHN KELLY,<br><br>Appellant. | No. 81352-8-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION |

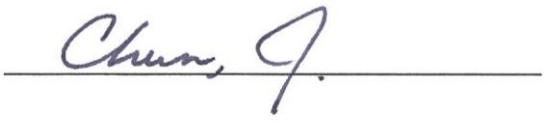
Appellant Michael Kelly moved for reconsideration of the opinion filed on November 8, 2021. Respondent State of Washington responded. The panel considered the motion pursuant to RAP 12.4 and determined that the motion should be denied. Additionally, the panel determined that the opinion should be withdrawn and a substitute opinion filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on November 8, 2021, is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed.

FOR THE COURT:



# Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON<br>Respondent,<br>v.<br>MICHAEL JOHN KELLY,<br>Appellant. | No. 81352-8-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

CHUN, J. — A jury found Michael John Kelly guilty of felony failure to register as a sex offender. Kelly appeals, contending that the to-convict instruction transformed this single means crime into an alternative means crime and that the State failed to prove both means. But the trial court used a portion of the defense's proposed to-convict instruction outlining two ways of committing the crime, which Kelly now makes the subject of this appeal. And he did not propose a unanimity instruction. Thus, the invited error doctrine precludes review. We affirm.

## I. BACKGROUND

In 2002, the Juvenile Department of King County Superior Court adjudicated Kelly guilty of felony child molestation in the first degree. Because of the conviction, Kelly had to register as a sex offender. See RCW 9A.44.130(1)(a). He pleaded guilty to, and was convicted of, failure to register as a sex offender in 2009 and in 2016.

When a sex offender's status changes to lacking a "fixed residence," they must register within three business days and then report weekly to the Sheriff's Office. RCW 9A.44.130(6)(a)–(b). Also upon release from custody for a sex offense, a sex offender must register within three business days. RCW 9A.44.130(4)(a)(i).

On August 9, 2018, Kelly registered as a sex offender lacking a "fixed residence" at the King County Sheriff's Office's registration window. According to King County's records, that day was the last time Kelly registered in 2018. Kelly checked in with the Sheriff's Office on September 7 and 18. He indicated that he was staying at the Union Gospel Mission's shelter every night between those dates.

From October 2 to 29, Kelly was in custody for violating a community custody condition of his 2016 conviction. According to Kelly, he registered as having a fixed residence on October 30, the day after his release. But according to the State, by November 5, Kelly had not registered with or reported to the Sheriff's Office.

The State charged Kelly with failure to register as a sex offender between November 5 and December 19. The initial information alleged that Kelly "did knowingly fail to comply with the requirements of RCW 9A.44.130, and that the defendant has been convicted in this state . . . of a felony failure to register as a sex offender on two or more prior occasions." The information did not allege the two different ways that Kelly committed the crime. The State's theory was that

Kelly failed to register by: (1) failing to report weekly as required of sex offenders who register as lacking a fixed address, and (2) failing to register within three days of release from custody for a sex offense.

Before trial, Kelly stipulated to his 2002 adjudication and 2009 and 2016 convictions.

The State proposed this to-convict instruction based on WPIC 49C.02:

> To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) Prior to November 5, 2018, the defendant was convicted of a felony sex offense;
>
> (2) That due to that conviction, the defendant was required to register in the State of Washington as a sex offender between November 5, 2018 and December 19, 2018; and
>
> (3) That during that time period, the defendant knowingly failed to comply with any requirement of sex offender registration.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

During a colloquy about the jury instructions, the trial court said, these "instructions are a mess, okay. Do you want to amend your information to specifically allege the ways in which Mr. Kelly failed to register to conform with your opening statement and the proof you've presented so far?" The trial court asked the State to decide whether it would amend the information by the next day. The State responded, "Absolutely. Thank you, your Honor."

Meanwhile, Kelly proposed a to-convict instruction that deviated from WPIC 49C.02 and included the two ways the State alleged Kelly failed to register. Kelly said his instruction would "make it clear to the jury . . . that there are essential elements of failing to register that the State must prove. So it created an either or prong."

In response to Kelly's proposed instruction, the trial court said, "I like this, frankly. And I think the State should, too. *It doesn't set this up as alternative means*, it just sets up the theory under which the State is operating here." (Emphasis added.) The trial court adopted Kelly's proposed language: "so we're sticking with the State's language in instruction 8, except. . . we are picking up the defense prong 3." By using "defense prong 3," the court created an "either or" instruction, instructing the jury that to find Kelly guilty it must find either (1) he lacked a fixed residence and failed to report weekly or (2) he failed to register within three days of release from custody for a sex offense. The State again asked the trial court "for the standard WPIC instructions." The trial court said:

> Yeah, but why don't you wait to ask for that until you figure out what you're doing with the information. You're going to like this a lot more if you decided to amend the information. Like I said, I'm not saying that you're required to, I'm just saying the case is right on point that argues the safest course.

The next day, the State amended the information by adding the two ways it alleged Kelly committed the crime:

> That the defendant Michael John Kelly in King County, Washington, between November 5, 2018 and December 19, 2018, having been convicted of having been convicted of Child Molestation in the First Degree, a felony sex offense as defined in RCW 9A.44.128, for which he was required to register as a sex

> offender under RCW 9A.44.130, did knowingly fail to comply with the requirements of RCW 9A.44.130, specifically, failed to report weekly, in person, to the sheriff of the county where the defendant was register [sic] due to lacking a fixed address *and* failed to register with the county sheriff for his county of residence within three business days of release from a local jail after being in custody for a sex offense *and* that the defendant has been convicted in this state . . . of a felony failure to register as a sex offender on two or more prior occasions.

(Emphasis added.)

Later, the court asked the parties if they took exception to the to-convict instruction. Neither party did. Nor did Kelly argue that the crime was now an alternative means crime or seek a unanimity instruction.

The court instructed the jury that to convict Kelly of the crime of failure to register as a sex offender it must find beyond a reasonable doubt that

> (1) Prior to November 5, 2018, the defendant was convicted of a felony sex offense;
>
> (2) That due to that conviction, the defendant was required to register in the State of Washington as a sex offender; and
>
> (3) *either*
>
> (a) That between November 5, 2018 and December 19, 2018: (i) the defendant lacked a fixed residence; and (ii) the defendant failed to report weekly, in person to the sheriff of the county where the defendant was registered; *or*
>
> (b) That between November 5, 2018 and December 19, 2018, the defendant, having been in custody for a sex offense, failed to register with the county sheriff for his county of residence within three business days of release from a local jail.
>
> If you find from the evidence that elements (1) and (2), and either (3)(a) or (3)(b) has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

(Emphasis added.)

The jury found Kelly guilty as charged. Kelly appeals.

## II. ANALYSIS

Kelly acknowledges that, under State v. Peterson, 168 Wn.2d 763, 765, 230 P.3d 588 (2010), failure to register as a sex offender is not an alternative means crime. He however contends that, under the law-of-the-case doctrine, the to-convict instruction transformed the crime into such a crime and the State failed to prove both means beyond a reasonable doubt. But Kelly proposed the portion of the jury instruction he now claims transformed the crime, and he did not propose a unanimity instruction. He contends insufficient evidence supports findings as to both claimed means and that the sentencing court erred in failing to provide a unanimity instruction. Given these circumstances, we conclude the invited error doctrine applies and Kelly cannot obtain relief on appeal.

"The original goal of the invited error doctrine was to 'prohibit[ ] a party from setting up an error at trial and then complaining of it on appeal.'" City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (alteration in original) (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). "To determine whether the doctrine applies, the court considers 'whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.'" In re Dependency of A.L.K., 196 Wn.2d 686, 694–95, 478 P.3d 63 (2020) (quoting In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014)).

In State v. Studd, our Supreme Court considered six consolidated cases in which the defendants proposed instructions that erroneously stated the law on

self-defense. 137 Wn.2d 533, 545–47, 973 P.2d 1049 (1999). Some of the defendants had proposed curative instructions, and some had not. Id. at 545. The court determined that the defendants who had not proposed a curative instruction invited the error, and therefore they could not complain of the erroneous self-defense instruction on appeal. Id. at 552–53.

Like the defendants in Studd who proposed the instructions at issue[1] and did not request curative instructions, Kelly did not request a unanimity or other curative instruction. He did not raise any issue even after the trial court indicated that the to-convict instruction did not transform the offense into an alternative means crime. Because Kelly proposed the instruction including the two ways of committing the crime and failed to propose a unanimity or other curative instruction, the invited error doctrine applies and precludes review of his claim.

The State concedes that "[w]hen the court held a formal exceptions conference, . . . the State did not take exception to the court's to-convict instruction." The State also concedes that the jury instruction required it to prove beyond a reasonable doubt that either Kelly failed to register within three days of release from custody for a sex offense or failed to report weekly after registering as a sex offender lacking a fixed residence.

[1] Cf. State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) ("Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording."); see also State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (applying the invited error doctrine even when the alleged error was of constitutional magnitude); State v. Corbett, 158 Wn. App. 576, 591–92, 242 P.3d 52 (2010) (same).

If the jury instruction required the State to prove at least one of the ways of committing the crime beyond a reasonable doubt, sufficient evidence supports finding that Kelly failed to register within three days of his release from custody for a sex offense. "Evidence is sufficient if, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Owens, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014).

During trial, Kelly testified to the following:

Q. Okay. So you know have you [sic] a duty to register; right?

A. I do.

Q. And you knew you had a duty to register during this time period, November 5th through December 19th, 2018?

A. Yes.

Then, Kelly testified:

Q. Okay. And you did not register in November of 2018 or December of 2018?

A. Correct.

Q. Okay. And you were in custody from October 2nd, 2018 to October 29, 2018?

A. Correct.

Q. Okay. And that was in relation to the '15 cause number?

A. Probation violation, yes.

Q. Correct. You pled guilty on that cause number, the '15 cause number; right?

A. Yes.

Q. And that was guilty to a sex offense; correct?

A. Correct.

Although Kelly testified that he registered or "checked in" with the Sheriff's Office on October 30, the State submitted evidence that August 9 was the last time Kelly registered in 2018. Viewing the evidence in the light most favorable to the State, sufficient evidence supports that Kelly failed to register within three days of his release from custody for a sex offense.

We affirm.

Chun, J.

WE CONCUR:

Bowman, J.

Verellen, J.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81352-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: March 2, 2022
Washington Appellate Project

## WASHINGTON APPELLATE PROJECT

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